IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

LAWRENCE FELDMAN, Plaintiff	: CIVIL ACTION NO. 06-2540
v	:
GOOGLE, INC., Defendant	: Philadelphia, Pennsylvania : November 1, 2006 : 3:07 p.m.

- - -

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE JUDGE JAMES T. GILES
UNITED STATES DISTRICT JUDGE

- - -

APPEARANCES:

For the Plaintiff: LAWRENCE E. FELDMAN, ESQUIRE
Lawrence E. Feldman & Associates
432 Tulpehocken Avenue
Elkins Park, PA 19027

ROSEANN E. WEISBLATT, ESQUIRE
WILLIAM ANGLE, ESQUIRE
115 Glen Lane
Elkins Park, PA 19027

For the Defendant: JEFFREY M. LINDY, ESQUIRE
Law Offices of Jeffrey M. Lindy
1800 John F. Kennedy Boulevard
Suite 1500
Philadelphia, PA 19103

Dockets.Justia.com

FTR Operator: Constance S. Flores

Transcribed By: Donna M. Anders

- - -

Proceedings recorded by For The Record; transcript produced by computer-aided transcription service.

- - -

(The following was heard in open court at 3:07 p.m.)

THE COURT: Good afternoon.

ALL: Good afternoon, Your Honor.

THE COURT: Counsel, please, your appearances for the record; for the plaintiff's side.

MS. WEISBLATT: For the plaintiff, Roseann Weisblatt, W-E-I-S-B-L-A-T-T, and William Angle.

MR. ANGLE: A-N-G-L-E.

THE COURT: Thank you.

MR. LINDY: Your Honor, good afternoon. On behalf of the defendant, Jeff Lindy, L-I-N-D-Y.

THE COURT: All right. There is a motion to dismiss. I'll hear it, Mr. Lindy.

MR. LINDY: Your Honor, thank you. What I don't intend to do is to belabor the briefs, nor can I rest on the brief, but I do want to highlight certain aspects of our argument.

Your Honor, with regards to the motion to dismiss, I think the most crucial argument that the plaintiffs have come back with in their response to our motion to suppress is that the forum selection clause is not mandatory.

With regards to the forum selection clause, it is in writing, it is attached to the defendant's --to Google's motion to dismiss.

At paragraph seven entitled "Miscellaneous" and we quoted this at page three of our memorandum of law to our motion to dismiss, it says that "The agreement must be governed by California law, except for its conflict of law principles and adjudicated in Santa Clara, California."

It says the agreement must, "must" is a verb, "must" is modifying not only the choice of law provision, which is California, but also the forum selection provision, which is adjudicated in Santa Clara, California.

So, I will simply and merely rely on our arguments in the brief with regards to that, and simply highlight it by saying what I just said. The language is unequivocal, it is a forum selection clause and the word "must" is used.

THE COURT: Well, tell me how was the contract itself made manifest to the plaintiff?

MR. LINDY: Your Honor, that obviously -- Your Honor's question goes to the plaintiff's arguments having to do with unconscionability as well -- in addition to the adhesion, whether the contract is that of adhesion.

As in all internet contracts, the contracting parties converse electronically and send documents electronically. In this case, the document, the Exhibit A, was sent electronically.

We do not cite to this case, but I do want to say that there is a --

THE COURT: Well, when you say sent electronically --

MR. LINDY: Yes.

THE COURT: -- what do you mean?

MR. LINDY: I mean that when the plaintiff, when Mr. Feldman accessed Google's program to sign up for the Ad Words advertising program, he did so by clicking.

When you sign up for it, when you pay for it with your credit card numbers, if that's indeed how he paid, the contract which is Exhibit A, is transmitted to him the way it was for the thousands of other people around the country who signed up with Google.

I guess by analogy -- I am certainly much more familiar with AOL, but when I signed up for AOL, you know, I did it, and a contract was transmitted to me which, if I wanted to print it out, I could have, and which I wanted to read in thoroughness, I could have done that as well.

THE COURT: You pay first and read later?

MR. LINDY: No, I don't believe so, Your Honor. I believe that -- I believe that they are entitled to read it if they want before they pay. All of this is accessible on the Google website.

THE COURT: Well, on the website how is it set up? Do you get to the pay option only if you go through a button that gives you an opportunity to see the contract?

MR. LINDY: If you are signing up to pay for it, you cannot access the contract as you're going through that sign-up procedure. But, if you get out of the sign-up procedure, I believe that you can access the contract to see if you want to go back and register for the advertising program.

THE COURT: Okay. All right. I understand your argument.

MR. LINDY: Okay. And, again, Your Honor, if I could do this for the record because, again, our apologies, we did not cite this in our initial brief.

The Seventh Circuit at 105 F.3d. 1147 and the plaintiff's name is Hill, said that internet contracts are just as enforceable as regular contracts, you know, entered into in the old-fashioned world.

So, we believe that Mr. Feldman's arguments with regards to whether the contract is unconscionable, or whether the contract is one of adhesion simply doesn't apply.

The only other thing I would note which we did in our papers, with regard to whether it's a contract of adhesion is simply -- and I don't mean to be flip when I say this, but Mr. Feldman holds himself out as a sophisticated lawyer who can do battle with industry giants.

Now, in this matter to come forward and say that he was not being dealt with at arm's length, that he did not understand the terms of what he was registering for, we don't really think that that argument can fly with regards to a lawyer such as Mr. Feldman.

I would note also that with regards to the remedy, we cited the Salavara (ph) case which is a Third Circuit case from 2001. The proper remedy, if we are correct, that the forum selection clause is mandatory and applies, the proper remedy is dismissal.

Your Honor, of course, always has the option to simply transfer this to the -- to your sister court out in California, but dismissal certainly is appropriate.

One thing that the plaintiff also dealt with and brought up in their response was the opt-out notice from the class action and plaintiff spent some time saying that the opt-out notice was inappropriate.

There simply is no law which suggests that the jurisprudence of forum selection and the jurisprudence of class action work is in any way connected.

So, we did think about filing a reply brief, but decided we didn't need to file a reply brief. I wanted to comment on that argument.

There is no law put forth by the plaintiff and, indeed, there is no law that says these areas of law, forum selection and opt-out in class actions are in any way related.

Finally, Your Honor, with regards to our unjust enrichment claim, what we would note, that is when this case was first filed by Mr. Feldman in the Philadelphia Court of Common Pleas, he did say that this was a hundred thousand dollar case. He did allege breach of contract, and he did attach the contract to that complaint.

When he amended the complaint which he did after seeing our motion to dismiss, when he amended the complaint in this Court, he alleged implied contract and did not attach the written contract.

Obviously, we're alleging that Mr. Feldman cannot have it both ways. We believe that this is, indeed, a written contract situation.

If Your Honor does not grant us relief on our motion to dismiss, the alternative argument that we would respectfully advance for Your Honor is that because this is an express contract under both California and Pennsylvania law the plaintiff cannot have a claim of unjust enrichment and, again, we brief that in our papers.

Your Honor, I stand here willing to answer any other questions, but other than that, I know you have read the papers, and I simply rest on our submissions.

THE COURT: Thank you.

MR. LINDY: Thank you.

MS. WEISBLATT: Let me first respond to some of counsel's points and start backwards.

There is an intersection between forum selection clauses and class actions where the net effect of a class action settlement to a punitive class member who opted out to vindicate his rights as an individual plaintiff is suddenly confronted with the forum selection clause that the Rule 23 notification did not provide to the national class.

THE COURT: Well, if the person decides to opt-out, doesn't the person take it upon herself to be her own counsel?

MS. WEISBLATT: If they're an attorney which, of course, we have that situation here, and I also want to inform

Your Honor that this class action against Google was basically a business tort.

These were all sophisticated attorneys, business people. The plaintiffs were all businesses, they were not consumers, we are not talking about that.

THE COURT: Well, the plaintiff here opted out because he thought he could get a better situation for himself --

MS. WEISBLATT: True, he was not happy --

THE COURT: -- some place else.

MS. WEISBLATT: True, Your Honor, he was not happy with the settlement. It's basically a coupon settlement.

What has happened in the settlement is it's a ninety million dollar value, and basically what they are giving to the class members is the ability to go back on the site and start advertising if they wish.

THE COURT: I'm not concerned about that. I mean, but if Mr. Feldman opted out, then he did so for his own reasons and at his own risk, the risk he's willing to take in the sense he thought he could do better by bringing his own suit.

MS. WEISBLATT: Right. And certainly as a plaintiff it is his position and our position that he can come to this Court in his home state and litigate the controversy.

We find it particularly specious of the other side that they are pushing or asserting a writing with the forum selection clause in it, that it is our position that it is not mandatorily worded sufficiently I will say, rather is --

THE COURT: Well, it says that it must be brought in Santa Clara County for adjudication.

MS. WEISBLATT: Which to me is not clear whether they mean or State or Federal Court in the first instance.

THE COURT: Well, it should be in Santa Clara County.

MS. WEISBLATT: Either court in the county.

THE COURT: Yes.

MS. WEISBLATT: Okay. But, it is our position that it is more of a permissive clause. If they really wanted it to be exclusive, if they wanted to confer jurisdiction exclusively to Santa Ana (sic), they should have so.

We have some cases in our brief that talk about some of the trigger language that you want to see in such a clause as only, exclusively, solely. That is our position and I am not going to belabor the point.

What I do want to add --

THE COURT: Do you concede that there was a contract?

MS. WEISBLATT: Your Honor, we have amended the -- we have filed a second complaint for a breach of an implied contract. We did not attach the writing. There is a question, and I think it goes back to your earlier questions to Mr. Lindy as to whether or not there was an arm's length negotiation entered here.

THE COURT: But, you would have to have a contract in order to have your underlying claim.

MS. WEISBLATT: We could have an implied contract without a writing, Your Honor.

THE COURT: No, but the -- you rely upon the written contract for the contract -- the claimed contract breach.

MS. WEISBLATT: If they want to assert the writing and for -- for argument sake, Your Honor, let's as -- they are coming here, they are asserting the writing, they would have done it, they have done it as, you know, procedurally, that's fine.

Our position is that going back to your earlier questions at the beginning of the argument, you know, and Mr. Lindy's admission here that these were old-fashioned -- you know, the internet is no different than entering contracts in the old-fashioned way.

Well, I say no, and I think your questions point to that, which is how was this contract entered, what precisely happens.

THE COURT: What happened?

MS. WEISBLATT: What happens, my understanding is that, in most internet contracts that I --

THE COURT: No, what happened in this instance?

MS. WEISBLATT: In this instance I believe that you can't necessarily -- you accept the terms, but you don't necessarily see all of the terms and you certainly -- and even if you see all of the terms, Your Honor, even if you go page by page by page and then you click "I accept" and then you give your Visa or Mastercard numbers, even in that case, okay, it's our position that you're still not negotiating arm's length like

THE COURT: But, you have three days to --

MS. WEISBLATT: -- the old-fashioned way.

THE COURT: But, you have three days to rescind the contract.

MS. WEISBLATT: Yes. Well, Google has taken the position in their papers, however, that -- you know, we could have gone back to Google and said, you know what, we don't like your forum selection clause, we don't like this clause, but that's really not the case, Your Honor.

These are mass contracts that are sent out to thousands of people every day. I think we've all seen them, we know how they work, you don't get to negotiate.

THE COURT: Well, was there an option on the computer program for Mr. Feldman to see the terms of the contract before he purchased it?

MS. WEISBLATT: That I am not sure of, Your Honor, and I think that that might go to an important issue here because certainly, certainly if you have to pay first -- you have to pay and accept and nothing happens if you don't accept. If it's -- all that is rough if you say I do not accept, I doubt that Google is going to take your money.

THE COURT: Well, do you contend that there was an agreement, or there was not an agreement?

MS. WEISBLATT: Your Honor, I will take the position that there was --

THE COURT: You have to choose, it seems to me.

MS. WEISBLATT: And I will take the position as we said on the papers, that it was an implied contact without a writing because --

THE COURT: An implied contract for what?

MS. WEISBLATT: For a purchase of advertising services.

THE COURT: All right. Now, I could construe the implied agreement as your obligation to pay for whatever clicks there are.

MS. WEISBLATT: Correct.

THE COURT: Whether you like the clicks or not.

MS. WEISBLATT: Okay.

THE COURT: And that's not -- so you would be obligated to pay for all clicks.

MS. WEISBLATT: I think that is what happened here.

THE COURT: Well, you have an argument, it seems to me, under the contract you were to pay only for non-fraudulent clicks.

MS. WEISBLATT: I believe the way that it's supposed to work and I think that the basis of the class action was that people wound up -- this winds up being a --

THE COURT: But, the --

MS. WEISBLATT: -- dispute where you wind up being overcharged.

THE COURT: The class action, I assume, was not adjudicated on its merits.

MS. WEISBLATT: Well, it was a settlement class, that's correct, Your Honor. I don't know how far they litigated.

THE COURT: So, I mean, all of it was a claim.

MS. WEISBLATT: True.

THE COURT: It seems to me that you have a contract or you don't have a contract. You either have this contract or you don't have a written contract.

If you have an implied contract -- you can't have an implied contract for all of the terms of the written contract that you like, excluding those that you don't like.

MS. WEISBLATT: Well, then, you know, we will stand on the position that there is no writing and if Your Honor feels that the way that the contract was entered that there was a writing, then I guess you're certainly --

THE COURT: So, it was an implied contract for what?

MS. WEISBLATT: To purchase advertising for a fee, but I think it was like -- it varied. It could be thirty dollars a click. If it was a really popular word it could be as high as seventy, eighty dollars a click.

THE COURT: Well, how would you determine what the rate should be and how was it determined --

MS. WEISBLATT: There was no rate settled.

THE COURT: Pardon?

MS. WEISBLATT: There was no rate agreed on in these contracts.

THE COURT: But, there were monies paid.

MS. WEISBLATT: Yes. I believe that what happened --

THE COURT: But, the monies were paid pursuant to the written agreement.

MS. WEISBLATT: Yes, but it was a pay per click. I don't believe there is a price of the clicks in the contract. I think you will agree with me that there is none.

I think what happens is, Your Honor, the popularity of the word drives up the price of the click, and so when you go to not enter the contract, but go to figure out what word you want to purchase, you see the going rate, and that can change from hour-to-hour, day-to-day.

MR. LINDY: And that is what is in the contract.

MS. WEISBLATT: Yes, they explain that to you. It's the internet, Your Honor, it is the twenty-first century, what can I say.

THE COURT: Well, we have to live in the twenty-first century.

MS. WEISBLATT: You know, and that's basically how it works. So, you see the price, but not within the contract's four corners. You see the price totally separate.

THE COURT: Are you sure of that?

MS. WEISBLATT: Yes, I am certain. I'm fairly certainly, yes. I think Mr. Lindy --

THE COURT: Fairly certain does not mean that you are certain?

MS. WEISBLATT: I think Mr. Lindy kind of agreed with what I have just stated.

MR. LINDY: I have been on the hot seat plenty with His Honor. I'm not on it right now, so I'm not going to jump into that.

MS. WEISBLATT: Okay. Well, I'm fairly certain, Your Honor, I'm not a hundred percent certain. I could certainly submit that later for Your Honor's review.

THE COURT: If you say you are not one hundred percent certain, that means you're not sure. That should be your answer.

MS. WEISBLATT: You know, I'm sure of my first -- actually I had seen the screen myself in being in the firm, and so I am going from my own recollection, although I was not the person who was dealing with those matters.

So, as far as my own recollection, you do see it whether you look at the contract or not because you have to make a decision whether you want to purchase the service and you want to know your prices.

If I can just finish by adding -- unless Your Honor wants to ask me another question, I would just like to finish my argument.

THE COURT: Now, I want to be sure --

MS. WEISBLATT: Go ahead.

THE COURT: -- not almost sure, but sure that you're contending that there was no -- that you were not bound and Google was not bound by the terms of any written contract.

MS. WEISBLATT: Yes, I'm sure, that's our position.

THE COURT: Okay.

MS. WEISBLATT: But, alternately if there was, our comeback is forum selection clause not good enough.

We should be here, not in the West Coast.

The witnesses, the documents and the -- you know, the conduct occurred here, there is no reason to be in California when Google themselves settled a State Court class action in Arkansas and didn't assert the forum selection clause on behalf of thousands of people, and there were two class actions filed in the Northern District of California.

THE COURT: Well, you know what they say about Arkansas lawyers.

MS. WEISBLATT: No, I don't know what they say. What they said in the order from Judge White of the Northern District that the plaintiff's position here is the only reason why Google wanted to go to Arkansas is because they thought they would get a better deal out of those lawyers which is my first, you know, learning of that reputation, Your Honor. I didn't know that.

THE COURT: I don't know anything about the reputation of Arkansas lawyers --

MS. WEISBLATT: Okay.

THE COURT: -- beyond presidential politics.

MS. WEISBLATT: Well, I guess -- I think I just -- I want to basically say, Your Honor, that, you know, if there is a writing, we don't believe that the 1404 transfer burden here has been met because this Court is more than adequate, and this Court is no more appropriate to hear this case than the court in California, and that is the burden.

THE COURT: I agree, this Court is quite competent to hear that over which it has jurisdiction and will not decline proper jurisdiction. But, on the other hand, if it doesn't have jurisdiction, it doesn't have jurisdiction.

You have an unjust enrichment claim.

MS. WEISBLATT: Yes, Your Honor.

THE COURT: And I think the law is that if there is any writing then you can't have an unjust enrichment claim.

MS. WEISBLATT: That would be the gist of the action doctrine, I believe.

THE COURT: Okay.

MS. WEISBLATT: And, so, again our position would be, if no writing, unjust enrichment claim at this early stage of the proceedings, alternate theory to -- you know, why dismiss it now, why not wait for summary judgment.

(Pause in proceedings.)

THE COURT: All right. I will consider this as a motion for summary judgment because I am going to require you to take discovery and to provide information to the Court about what the program was, not what Mr. Feldman may have done, but what the program offered to any user in the making of the selection -- in making choices.

I read many cases on the subject of the click rap and I believe this is important to know for the parties and for the Court and for any Appellate Court that might be interested in hearing the appeal of any unhappy person with any decision that this Court has to make.

So, that is one of the things that I feel is necessary for the trial judge to develop this part of the record in order to consider and decide these issues that have been raised on the motion to dismiss.

So, this is not a license to have general discovery, but it is to provide for the Court within fifteen days this information about what was on the screen at that time.

MR. LINDY: Your Honor, if I may. Your Honor referenced discovery and I don't have the answer to this question. But, if defendant Google provides us information by way of written materials as opposed to actual live depositions and things of that nature, I would assume that's okay.

THE COURT: That's all right. And it should be presented in such a way that it is through an affiant who knows what was there, what was -- there shouldn't be any dispute about that.

MS. WEISBLATT: Okay.

THE COURT: Maybe there is going to be a dispute, but there shouldn't be a dispute about what on a certain date was going through the wire or through the air to the internet user because you can pinpoint the date of the acceptance.

MR. LINDY: Yes.

MS. WEISBLATT: Yes.

THE COURT: All right. I will not require from you further argument. I will decide the issues promptly upon receipt of this additional information. Thank you very much.

MR. LINDY: Your Honor, thank you very much.

MS. WEISBLATT: Thank you, Your Honor.

THE COURT: Okay.

(Proceedings adjourned, 3:31 p.m.)

* * *